A

GOBALAKRISHNAN NAGAPAN

v.

DIRECTOR OF IMMIGRATION, SARAWAK & ORS

B

HIGH COURT MALAYA, KUCHING
RHODZARIAH BUJANG JC
[AR NO: JR-1-2009-I]
12 FEBUARY 2009

C ***IMMIGRATION:*** *Cancellation of entry permit - Certiorari - Right of entry of citizen into East Malaysian State - Legitimate political activity - Burden of law - Ouster clause - Exclusion of judicial review - Immigration Act 1959/63, ss. 59A, 66(1), 67*

D ***ADMINISTRATIVE LAW:*** *Exercise of administrative powers - Immigration - Judicial review - Right of entry of citizen into East Malaysian State - Legitimate political activity - Burden of law - Ouster clause - Exclusion of judicial review - Immigration Act 1959/63, ss. 59A, 66(1), 67*

E This was an application by the applicant seeking leave to quash the decision of the Director of Immigration of Sarawak refusing to allow him to enter Sarawak when he arrived at the Kuching International Airport on 24 December 2008. The applicant, from the political party Parti Keadilan Rakyat, was a Malaysian citizen
F from Semenanjung Malaysia and a member of Parliament for the constituency of Padang Serai. His contention was that he should have been allowed to enter the State without any need for a permit or a pass as he was there pursuant to s. 67 of the Immigration Act 1959/63 ('Act') for the sole purpose of engaging
G in legitimate political activity, which was to attend a political function organised by the party's Lubok Antu Division that was meant to welcome new members of the party.

Held (dismissing the application):

H

(1) The burden of law placed on the applicant to prove that he wanted to come to Sarawak for a legitimate political activity must be discharged at the time and point of entry, which was as soon as the applicant disembarked at Kuching International
I Airport and presented himself to the Immigration Officer manning the checking counter. That burden was not meant to be discharged at some later date, time or place. Therefore, a

non-Sarawakian such as the applicant who wished to be granted free and unlimited access in the State under s. 67 of the Act must arm himself with the necessary proof, in order to discharge that burden, that he was in the State for a legitimate political activity. In this instance, the applicant had failed to present such proof for if he did he would have been allowed to enter without a permit or a pass. The decision by the Immigration Authority not to let him in for failing to discharge that burden was a decision made under the Act and just like the decision made under s. 66(1) of the Act in the Federal Court case of *Pihak Berkuasa Negeri Sabah v. Sugumar Balakrishnan & Another Appeal*, it was not subject to a judicial review by reason of the ouster clause under s. 59A of the Act. His failure to discharge the burden also meant he should be treated like any other non-Sarawakian where entry would be at the discretion of the State Authority under s. 66(1) of the Act. This was obviously what happened to him when the 1st respondent issued him with a Notice of Refusal of Entry dated 24 December 2008. The mere fact that the applicant was a member of Parliament and held an important post in a political party did not automatically attract a presumption in his favour that his entry into the State was for a legitimate political activity. Furthermore, even if the ouster clause did not apply to him, the applicant still failed, on the facts, to convince this court that he had an arguable case for leave to issue *certiorari* to be granted to him. *Pihak Berkuasa Negeri Sabah v. Sugumar Balakrishnan & Another Appeal* (foll). (paras 15, 16, 17 & 20)

Case(s) referred to:

Association Of Bank Officers, Peninsular Malaysia v. Malayan Commercial Banks Association [1990] 2 CLJ 734; [1990] 1 CLJ (Rep) 33 SC ***(refd)***

George John v. Goh Eng Wen Bros Filem Sdn Bhd & Ors [1988] 1 MLJ 319 ***(refd)***

Pihak Berkuasa Negeri Sabah v. Sugumar Balakrishnan & Another Appeal [2002] 4 CLJ 105 FC ***(foll)***

Tuan Sarip Hamid v. Patco Malaysia Bhd [1995] 3 CLJ 627 SC ***(refd)***

Legislation referred to:

Immigration Act 1959/63, ss. 59A, 66(1), 67

Rules of the High Court 1980, O. 53 r. 3(3)

A *For the applicant - Dominique Ng; M/s Dominique Ng & Assoc*
For the 1st respondent - Suzana Atan; Jabatan Peguam Negara
For the 2nd & 3rd respondents - JC Fong (Supian Tarmizi Hj Mohd Tazuddin with him); State A-G's Chambers Kuching Sarawak

B *Reported by Suresh Nathan*

JUDGMENT

C **Rhodzariah Bujang JC:**

The Application

[1] The applicant sought leave to quash the decision of the Director of Immigration Sarawak who had refused to allow him to
D enter Sarawak when he arrived at the Kuching International Airport on 24 December 2008.

[2] The applicant, a Malaysian citizen from Semenanjung Malaysia is member of Parliament for Padang Serai constituency and is from a political party, Parti Keadilan Rakyat. He said he is
E a member of the party's Supreme Council and held, at the time of the application, the portfolio of the party's Chief of the National Integration Bureau.

[3] He contended that he should have been allowed to enter
F the state without any need for a permit or a pass as he was here, in the words of s. 67 of Immigration Act 1959/63 ("the Act"), "for the sole purpose of engaging in legitimate political activity ..."

[4] That legitimate political activity, said the applicant in his
G affidavit in support of his application for leave, was to attend a political function organized by the party's Lubok Antu Division which was meant to welcome new members of the party and he was invited, in his capacity as Chief of the National Intergration Bureau, to deliver a closing speech.

H

The Hearing

[5] At the hearing of this *ex parte* application, the Director Of Immigration (the 1st respondent) was represented by a Senior Federal Counsel, Ms Suzanna Atan and the State Secretary (as
I 2nd respondent) as well as the Government of Sarawak (the 3rd respondent) were represented by Datuk JC Fong together with

Mr. Sufian Tarmizi. The respondents had been served with the application as required by O. 53 r. 3(3) of Rules of the High Court 1980 and for the record, learned counsel for the applicant didn't raise any objection on their *locus standi* to appear for the respondents at the hearing of this application.

[6] Even if he did, I would say that based on the case of *George John v. Goh Eng Wen Bros Filem Sdn. Bhd. & 2 Ors* [1988] 1 MLJ 319 I have the discretion in applications such as this, to allow the respondents to be represented if the circumstances so warrant and given the important point of law raised in this application, which I shall deal with presently, I was grateful for their assistance in deciding this matter.

Point Of Law

[7] The question of law which preyed in my mind when I read through the application was whether the ouster clause under s. 59A of the Act applied to the applicant who claimed right of entry into state under s. 67 of the Act.

Section 59A

[8] The ouster clause in clear and explicit terms provides that any act done or decision made by of the state authority under the Act is not subject to judicial review except on grounds of procedural non compliance of the requirements of the Act or Regulations governing the act or decision.

[9] The Federal Court in the case of *Pihak Berkuasa Negeri Sabah v. Sugumar Balakrishnan & Another Appeal* [2002] 4 CLJ 105. (*Sugumar*'s case) have settled the operation of s. 59A *viz-a-vis* s. 66(1) by deciding that a decision of the state authority under s. 66(1) of the Act to deny a non Sabahan a permit or a pass to enter and remain in the state is subject to the ouster clause.

Section 66(1)

[10] Section 66(1) made it a mandatory for a Malaysian citizen who is a non Sabahan or a non Sarawakian to obtain a permit or a pass from the immigration authority of the state before entering the respective states unless he belongs to the three classes of persons specified in para (b), (c) & (d) of that subsection. For the record, the applicant in this case does not belong to any of these three classes of persons.

A **Section 67**

[11] Section 67, on the other hand is enacted as an exception to s. 66(1) of the Act, and provides that if the entry into the two states is for the purpose of a legitimate political activity such a
B pass as required under s. 66(1) is not necessary but the burden is on the citizen to prove so.

The Applicant's Case

[12] The applicant's counsel, Mr. Dominic Ng submitted that the
C ouster clause is not applicable to the decision of the 1st respondent in this case because there was a procedural non compliance in that there was no evidence that the 2nd respondent has directed the 1st respondent not to allow the applicant entry into the state. This last contention needs no in
D depth consideration. I need only to look, for an answer, at para 9 of the applicant's own affidavit where he deposed that the 2nd respondent had directed the 1st respondent not to issue him with the pass to enter the state. Having taken that stand and even more telling, suing the State Secretary as the 2nd respondent and
E the Government of Sarawak as the 3rd respondent in this case, the applicant should not be allowed to backtrack and submit that no such directive was issued by the 2nd respondent to the 1st respondent.

F **[13]** It is fair that I also mentioned Mr. Dominic Ng's application to adjourn this matter to enable a more extensive argument be prepared on the applicability of ouster clause and *Sugumar*'s case to the facts of this case.

G **[14]** I was not minded to grant the adjournment because before filing this application, the applicant should be fully appraised of the stumbling block that the law placed on his path and should therefore be prepared with arguments to counter it's application to him. Further, by then what I have heard in submissions and
H read from the case authorities referred to me by counsels, have left me convinced that the ouster clause applied in this case and there was no grey areas which need further clarifications or considerations. Therefore, at the conclusion of the hearing, I dismissed the application with costs to the respondents.

I

Reasons For Dismissing The Application

[15] In dismissing the application, uppermost in my mind was the burden the law placed on the applicant to prove that he wanted to come to Sarawak for a legitimate political activity.

[16] Then I asked myself this pertinent question: at which point in time does he discharge this burden? The obvious answer is, at the time and point of entry and that would be as soon as the applicant disembarked at Kuching International Airport and presented himself to the Immigration Officer manning the checking counter. That burden, in my view, was not meant to be discharged at some later date, time or place. It must be discharged, again I stressed, at the point of entry. Therefore, a non Sarawakian such as the applicant who wished to be granted a free and unlimited access in the state under s. 67 must arm himself with the necessary proof, in order to discharge that burden, that he was in the state for a legitimate political activity. I am really stating the obvious when I surmised that the applicant in this case has failed to present such a proof for if he did he would have been allowed to enter without a permit or a pass. Now the decision by the immigration authority not to let him in for failing to discharge that burden was a decision made under the Act and just like a decision made under s. 66(1) in *Sugumar*'s case, it was not subject to a judicial review by reason of the ouster clause. His failure to discharge the burden also meant he should be treated like any other non Sarawakian where entry would be at the discretion of the state authority under s. 66(1). This was obviously what happened to him when the 1st respondent issued him with a Notice Of Refusal Of Entry dated 24 December 2008 (see exh. GK1 to the applicant's affidavit filed in support of his application) and I reiterate, where decision was made there under, as decided by *Sugumar*'s case, it would not be subject to judicial review.

[17] In my view the mere fact that the applicant is a Member of Parliament and holds an important post in a political party does not automatically attract a presumption in his favour that his entry into the state was for a legitimate political activity.

A **Proof Of Legitimate Political Activity**

[18] Assuming I was wrong in these reasonings, I will now proceed to discuss the alternative view and that is whether he has shown "... *prima facie* that the application is not frivolous or
B vexatious and there is some substance in the grounds supporting the application ... an arguable case ... for granting the relief ..." (per Ajaib Singh SCJ in *Association Of Bank Officers, Peninsular Malaysia v. Malayan Commercial Banks Association* [1990] 2 CLJ 734; [1990] 1 CLJ (Rep) 33 SC. Unfortunately (for the applicant),
C the consideration of this view still forced me to the same conclusion on the fate of his application. Combing through his affidavit in support of the application, I found absolutely no evidence other that his own bare assertion, that he had a political function to attend; neither an invitation nor a leaflet on the
D proposed function. What was exhibited was an earlier invitation by the 3rd respondent for him to attend the state level Gawai Dayak open house which was held on 14 Jun 2008. What was also exhibited was an extract from the Hansard which showed the debate in Parliament in which the applicant, together with the
E Member of Parliament for Bandar Kuching, YB Chong Cheng Jen raised the issues relating to, *inter alia*, contracts awarded to a company, Cahaya Mata Sarawak. His vocalness in Parliament was, he claimed, the real reason for the denial of his entry into Sarawak. However on that political function in Lubok Antu,
F nothing.

[19] Thus, I was not at all surprised that his claim to enter Sarawak under s. 67 was rejected by the Immigration authorities on 24 December 2008. If at this leave stage he could not come
G up with some evidence on a legitimate political activity, can he then be said to satisfy the requirement of an arguable case as required by the law? I think not.

[20] By answering that poser in the negative, I do not believe I was considering substantial issues on merits but was infact looking
H for some evidential basis for the applicant to say that he has the right to seek refuge under s. 67. The Supreme Court in *Tuan Sarip Hamid & Anor v. Patco Malaysia Bhd* [1995] 3 CLJ 627 SC held that at this leave stage, the applicant" should ensure that his affidavit in support of his application is as detailed and
I comprehensive as the circumstances will permit, and it should

exhibit all the documentary exhibits which are truly relevant and upon which he intends to rely." (emphasis added). The least the applicant could have done in this case would be to convince the court that the legitimate political activity was not a mere excuse but a real event. This, as I said earlier, he has failed to do. I believe that, when, even at this stage I have good and cogent reasons to say, without delving into the substantial issues on the merits of the case, that the substantive motion for *certiorari* was bound to fail, the proper recourse would be not to grant leave. Therefore, even if the ouster clause does not apply to him, the applicant still failed to convince me that he has an arguable case for leave to issue *certiorari* to be granted to him.

[21] In conclusion, I would say this. The Federal Court in *Sugumar*'s case have emphasized that the special right on control of immigration by the state authority was one of the terms of participation by Sabah and Sarawak in the formation of Malaysia. This special right, in my view, cannot be whittled away by a mere assertion, *albeit* one made in an affidavit, because to allow that would be to demean the constitutional safeguards given to the two states.